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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Part 95 of the Commission's	)	WT Docket No. 98-169
Rules to Provide Regulatory Flexibility in the	)	RM-8951
218-219 MHz Service	)	

To: The Commission

JOINT PETITION FOR CLARIFICATION

IN-SYNC INTERACTIVE CORPORATION

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Summary

Subject to the necessary clarifications as discussed in this Petition, the revised rules for 218-219 MHz Service adopted by the Commission will help maximize the potential of commercially viable services in the 218-219 MHz frequency band. Nevertheless, the following issues should be clarified by the FCC by public notice or reconsideration order:

- When an Eligible Licensee assigns its licenses to an entity that qualifies for installment payments, the assignee would assume the assignor's restructured payment schedule without being required to bring the assignor's account current prior to consummating the assignment.

- The definition of "small businesses" for entities that want to acquire 218-219 MHz licenses or for licensees that restructure and wish to keep their "small business" status should be derived from Section 95.816(b)(2) of the Commission's rules rather than the Part 1 of the rules.

- It would be unnecessary and constitute a retroactive rulemaking if the Commission requires notes and security agreements for 218-219 MHz licensees.

- The Commission should clarify that interest on retained licenses will not accrue during the period since March, 1998 when the Commission suspended installment payments.

- The Commission should clarify that the 25 percent remedial credit should apply to licensees that surrender their licenses as well as those that retain them, in order to be consistent with the recent holdings of *Adarand* and *Graceba*.

- Any timely-filed grace period request should qualify as a "properly filed" request.

- The Commission should release a licensee eligibility status list to provide the public with certainty regarding the payment and amnesty elections made by 218-219 MHz licenses.

- The Commission should clarify that licensees will not be required to file renewal applications at the end of the five-year term of their initial licenses in light of the FCC's extension of the term of 218-219 MHz licenses to ten years.

- The Commission should, by public notice, provide hypothetical examples of how a licensee's reamortized payments will be calculated under the different restructuring options.

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JOINT PETITION FOR CLARIFICATION

In-Sync Interactive Corporation, Loli, Inc., Bay Interactive Ventures, Inc., ABR Communications, Inc., Faycomm, Inc., IVDS On-Line Partnership, Cyberforce, LLC and Southeast Equities, Inc., all holders of numerous licenses in the 218-219 MHz Service (the "Licensees"), by counsel and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for clarification of certain aspects of the Commission's *Report and Order and Memorandum Opinion and Order*, WT Docket No. 98-169, FCC 99-239, released September 10, 1999 ("*Report and Order*").[1]

[1] The rules adopted in the *Report and Order* were published in the Federal Register on November 3, 1999. *See* 64 FR 59656 (1999). On November 30, 1999, the Commission on its own motion altered one of the payment restructuring options established in the *Report and Order*. *See Order on Reconsideration*, WT Docket No. 98-169, FCC 99-372, released November 30, 1999 ("*Recon Order*"). To the extent the Licensees determine that the *Recon Order* should be clarified or modified, they will make an appropriate filing on or before the deadline fixed by FCC rules.

Introduction

The Licensees commend the Commission for adopting the *Report and Order*, which adopts rules and policies easing regulatory and technical barriers to help maximize the potential of commercially viable services in the 218-219 MHz frequency band. In the *Report and Order,* the Commission responded to the concerns and recommendations of the Licensees and other 218-219 MHz service licensees, which have faced long odds in developing competitive services. With the benefits of longer license terms, restructured installment payments, elimination of ownership and construction restrictions and the relaxation of certain technical rules, the 218-219 MHz industry now has many of the tools necessary to attract needed capital for equipment manufacturing and marketplace deployment. To this end, and based in some measure by the benefits the new rules promise, some 218-219 MHz licensees have now secured investment financing to initiate services in certain of their markets.

As can be expected in such a far-reaching order, certain aspects of the *Report and Order* require clarification. These issues, discussed below, should be clarified by the Commission either by public notice or in a reconsideration order.[2]

[2] The Licensees are aware that on October 12, 1999, Celtronix Telemetry, Inc. ("CTI") filed a petition for reconsideration of the *Report and Order*. As set forth herein, in some respects, the Licensees' views are consistent with those espoused by CTI. Notwithstanding, the Licensees reserve their right to address CTI's petition, as well as those that may be filed by others, in a consolidated pleading in the next round of the pleading cycle in this proceeding.

Discussion

I. The Commission Should Confirm That It Will Permit Assignees To Assume The Restructured Payment Schedules Of Eligible Licensees.

The Commission should clarify that when an Eligible Licensee (as defined in the *Report and Order*) assigns a license to an entity that qualifies for installment payments, the assignee would be entitled to assume the restructured payment schedule associated with the assigned license. Specifically, the Licensees request that the Commission clarify that, contrary to the Commission's policies that generally require installment payment portfolios to be brought current prior to assignment, in the case of 218-219 MHz licensees, the assignee would be entitled to have all unpaid interest reamortized into the new principal.

The Commission also should clarify the definition of "small businesses" for entities that want to acquire 218-219 MHz licenses, or for licensees that restructure and wish to keep their "small business" status. The *Report and Order* modified Section 95.816(b)(2) to define "small business" as an entity that "together with its affiliates and controlling interests, has average gross revenues not to exceed $15 million over the last three years."[3] An entity meets the small business or very small business definition by considering, on a cumulative basis, the gross revenues of the entity, its affiliates, and controlling interests. By contrast, the Commission's Part 1 rule, for purposes of assignment or transfer of control applications, requires applicants to report "separately and in the aggregate the gross revenues. . . . of the applicant and its affiliates, *applicant's*

[3] *See* Section 95.816(b)(3).

attributable investors, affiliates of attributable investors . . ."[4] Part 1 does not define "attributable investors."

The Commission has proposed to change the Part 1 rule to eliminate the "attributable investors" standard and replace it with a "controlling interest" test, very similar to the Part 95 auction participation rule. However, 218-219 MHz licensees may want to assign licenses or restructure before the Commission adopts new Part 1 rules. Therefore, the Licensees request that the Commission clarify that the definition of "small business" in Section 95.816 will be used for all transfers of control and assignments of 218-219 MHz licenses. Clarification of the standard will allow licensees both increased certainty as to the Commission's rules and greater flexibility to restructure and bring in additional investment capital.

II. The Commission Should Not Require Notes And Security Agreements For 218-219 MHz Licensees.

The Commission stated that licensees that opt for reamortization and, presumably, applicants that apply to acquire 218-219 MHz licenses, may be required to execute "loan documents," which the Licensees understand to mean notes and security agreements.[5] Such a requirement is redundant under the Commission's rules. Section 1.2110(e)(4)(iv) requires licensees to make installment payments, plus any applicable penalties, within 180 days of the payment date, or the license is automatically canceled. The Commission may refer any

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[4] *See* Section 1.2112(b)(1) (emphasis added).

[5] *See Report and Order* at ¶44.

uncollected debt to the Department of Justice for legal action under the Debt Collection Act.[6] Thus, notes and security agreements are superfluous and unnecessary.

Applying the Part 1 rules requiring notes and security agreements to 218-219 MHz licensees also would constitute an impermissible retroactive rulemaking. Licenses in the 218-219 MHz services were granted in 1994 and 1995, and it was not until February 28, 1997 that the Commission adopted amendments to the Part 1 rules requiring notes and security agreements.[7] Importantly, there was no indication at that time that this requirement would ever be applied to 218-219 MHz licensees, since their installment program was already implemented without such documents and the Commission took no steps to have the 218-219 MHz licensees sign those documents. To apply the rule now is unfair given that these licensees never had a chance to participate in a notice and comment proceeding on the requirements.

Further, when security interest documentation was adopted, the Chairman stated that the goal was to balance the competing considerations of "ensuring the integrity of the auction process," but that it was also "important, however, that the Commission not take steps in pursuit of that goal that would themselves make it difficult for licensees to meet their payment obligations."[8] The note and security agreement process, and related "certification of solvency,"

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[6] *See* Section 1.2110(e)(4)(iv).

[7] *See Amendment of Part 1 of the Commission's rules – Competitive Bidding Proceeding*, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 12 FCC Rcd 5686 (1997).

[8] *Applications for Assignment of Broadband Personal Communications Services Licenses for Station KNLF 457, Market B305, C Block, Montgomery, Alabama, et. al*, Separate Statement of Chairman William Kennard, 14 FCC Rcd 1124 (1998).

has dramatically slowed the Commission's processing of assignment and transfer of control applications.[9] Delay can impede a licensee's ability to rapidly respond to changes in the market, or to restructure in order to meet marketplace demands. While the "balancing interest" in the PCS context favored notes and security agreements, the total debt, and historical difficulties the 218-219 MHz service has experienced, require a different "balancing" of those competing considerations: one that favors less paperwork and facilitates rapid response to changing capital markets and an exceedingly competitive wireless services marketplace.

III. The Commission Should Clarify That Only Interest From The Original Installment Payment Plan Will Be Reamortized.

The Commission should clarify that it will only recapitalize prior installment payments into the reamortized principal amount, and not apply interest for the period after installment payments were suspended in March, 1998.[10] The statements from the Commission on this matter conflict.

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[9] *Id. See also Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, 13 FCC Rcd 6293, 6307 (1998) ("*Forbearance Order*"). The *Forbearance Order* adopted rules allowing wireless licensees to notify the Commission of non-substantial changes in ownership, except for installment payment licensees. *Forbearance Order* at ¶ 25. *See also Public Notice, "Wireless Telecommunications Bureau, Commercial Wireless Division Issues Transfer and Assignment Procedures for Commercial Mobile Radio Service Licenses Subject to the Unjust Enrichment Provisions,"* DA 97-653 (released April 2, 1997) notifying licensees that processing of assignment or transfer applications for designated entities could requires up to an additional 120 days in processing just to allow coordination between the Treasury Department and the FCC, as to the relevant notes and security agreements.

[10] *See Amendment of Part 95 of the Commission's Rules to Provide Regulatory, Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services*, 13 FCC Rcd 19064 (1998) ("*Suspension Order*").

In the *Report and Order*, the Commission states that it will "capitalize all *accrued* and *unpaid* interest into the principal amount."[11] The text of new Section 95.816(a), however, states that only "*unpaid* interest from grant date through election date will be capitalized.." The Licensees request clarification that only unpaid installment payments, and not interest accrued since the 1998 suspension of installment payments, will be capitalized into the new reamortization schedule.

This outcome would be consistent with the *Suspension Order* wherein the Commission announced it was suspending payments, but made no mention at that time that interest would accrue. Practically speaking, the *Suspension Order* forbade licensees from making installment payments. To impose on licensees an interest penalty for installments they could not make would confound logic. The requested clarification not only would be fair, but will assist licensees in determining their revised principal balance and be consistent with the Commission's goal of "full and effective development and deployment of the 218-219 MHZ Service."[12]

IV. The Commission Should Clarify That The 25 Percent Remedial Credit Should Apply To Licensees That Surrender Their Licenses.

In light of the Supreme Court's decision in *Adarand*[13] and consistent with auctions conducted after that decision,[14] the Commission decided to apply a 25 percent "remedial" bidding credit to the accounts of every qualified "small business" that holds a license obtained pursuant

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[11] *Report and Order* at ¶44 (*emphasis added*).

[12] *Id*. at ¶14. *See also* CTI Petition at p.6

[13] *Adarand Constructors*, *v. Pena*, 515 U.S. 200 (1995) ("*Adarand*")

[14] *See Report and Order* at ¶62, n.206.

to the 1994 218-219 MHz service auction.[15] Although the Commission indicated that this remedial credit would be applied to retained licenses and calculated prior to computing the reamortization or payment resumption amounts, the Commission did not state whether the remedial credit would be applied to licenses that are surrendered to the Commission under the Amnesty option. In fact, certain language in the *Report and Order* suggests that the Commission will not refund any portion of any down payment to a licensee that surrenders its license.[16]

This should not be the case. To be consistent with the principles of *Adarand* and *Graceba*,[17] a licensee entitled to receive the remedial credit (*i.e.*, qualified as a "small business" and did not receive a 25 percent credit on its 1994 auction bid) that elects Amnesty and returns its license to the FCC should be entitled to a refund equal to 25 percent of the down payment made on that license, in addition to any other refunds or credits to which that licensee is entitled under the revised rules. By its very definition, the 25 percent credit is "remedial," intended to correct a past injury. Absent such a refund, a down payment made by a licensee that surrenders its license under the Amnesty option will have been 25 percent more than the down payment made by a licensee that elects to retain its licenses. Further, a licensee electing Amnesty for some of its licenses and Resumption for others would obtain a credit only on those it elected to retain, despite the fact that the licenses were obtained at the same auction under the same rules. As stated

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[15] *Id.* at ¶55.

[16] *Id.* at ¶49.

[17] *Graceba Total Communications v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997) ("*Graceba*").

by CTI, such an outcome would demonstrate a lack of parity among licensees,[18] and would be constitutionally suspect under *Adarand*. Accordingly, the Commission should clarify that it will refund 25 percent of all down payments made by all "small business" licensees, whether or not those licensees retain or surrender their licenses.

V. The Commission Should Clarify That Any Timely-Filed Grace Period Request Qualifies As A "Properly Filed" Request.

In the *Report and Order*, the Commission stated that the payment restructuring options would be available only to those licensees that were current in installment payments as of March 16, 1998 (*i.e.*, less than ninety days delinquent) or had *properly filed* grace period requests under the former installment payment rules.[19] However, the Commission failed to define what constitutes a "properly filed" grace period request.

The Licensees observe that the concept of "proper" filing speaks to a process and not to the content of the grace period request itself.[20] This is particularly so here because the Commission stated in the *Report and Order* that it will dismiss all pending grace period requests, presumably without examining the merits of those requests.[21] Thus, there would be no basis on which the Commission could rely to determine whether a grace period request was "properly"

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[18] *See* CTI Petition at p.7.

[19] *See Report and Order* at ¶37. The *Report and Order* also describes an eligible licensee as one that filed a grace period request "in conformance with the former rules." *Id.* at ¶38.

[20] Obviously and correctly, the Commission does not, at this juncture, desire to evaluate the numerous grace period requests that were filed, especially in light of the administrative resources required, the elimination of the grace period rules and the relief options the Commission is offering in the *Report and Order*.

[21] *See Report and Order* at ¶45.

filed other than its timeliness. In these circumstances, the only fair result is for the FCC to confirm that a grace period request will be deemed to be "properly filed" if it was timely filed with the Commission.

VI. The Commission Should Release A Licensee Eligibility Status List.

The Commission took several important steps in the *Report and Order* to facilitate secondary market sales of 218-219 MHz licenses. For example, the Commission eliminated the one-to-a-market license ownership restrictions and the anti-trafficking provisions applicable to licenses awarded by lottery, and adopted liberal partitioning and disaggregation rules. To further facilitate investment in 218-219 MHz licenses, following the election date, the Commission should publish a list of the options that each Eligible Licensee has selected. Such information would provide a greater measure of investor certainty with respect to the future acquisition and development of 218-219 MHz licenses.

VII. The Commission Should Clarify That Licensees Will Not Be Required To File Renewal Applications.

In the *Report and Order*, the Commission amended Section 95.811(d) to extend the term of 218-219 MHz licenses from five to ten years.[22] This rule change (as well as the others adopted in the *Report and Order*) will be effective on January 3, 2000. The licenses granted following the 1994 auctions specify five-year license terms that expire on January 28 or February 18, 2000, and pursuant to Section 1.949, renewal applications for these licenses must be filed within 90 days prior to the end of the license term. In fact, Commission staff has mailed renewal notices to 218-219 MHz licensees.

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[22] *See Report and Order* at ¶31.

In light of the fact that the January 3, 2000 effective date precedes the expiration of the initial five-year term, it would be contrary to the spirit (if not the letter) of the new rules and a tremendous waste of Commission resources if licensees were required to file renewal applications. Accordingly, the Commission should expeditiously confirm by public notice that in light of the extension of the term of 218-219 MHz licenses to ten years, licensees will not be required to file renewal applications at the end of the fifth year of their license terms. Further, the Commission should issue new licenses to all licensees that reflect the extended ten-year license term.

VIII. The Commission Should Clarify The Methodology For Calculating Reamortized Payment Schedules.

In the proceedings involving the debt restructuring for PCS C and F block licensees, the Commission made extensive use of hypothetical examples to clarify how a licensee's reamortized payments would be calculated under the different restructuring options adopted by the Commission.[23] Such helpful illustrations were noticeably absent from the *Report and Order*.

The Licensees specifically request that the Commission's examples include application of the 25 percent remedial in combination with the 85 percent Prepayment credit. In this scenario, the Commission should clarify that the remedial credit will apply first, and that that amount would be refunded to the licensee before any other credits are applied. This is necessary in order to fully implement the decisions in *Graceba* and *Adarand*. This is best illustrated by an example where a licensee bid $1 million for a license and made a $200,000 down payment on that license. In this scenario, the Commission should: 1) recalculate the total bid price of the license ($750,000); 2)

[23] *See, e.g., Amendment of Parts 1 and 24 - Installment Payment Financing*, 12 FCC Rcd 16436, nn.143-144 (1997).

recalculate the 20 percent down payment ($150,000); 3) refund the licensee's excess payment of $50,000 on deposit with the Commission; and 4) apply the 85 percent credit to the $150,000 on deposit.[24]

Accordingly, the Commission should provide in a public notice, through the use of hypothetical examples, how a licensee's reamortized payments will be calculated under the different restructuring options. Moreover, this public notice should be released as soon as possible, in advance of the Election Date, so that licensees may make informed and certain decisions on the financial consequences of choosing which licenses to surrender and which to retain.[25]

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[24] By contrast, it would be contrary to *Graceba* and *Adarand* if the licensee would only receive the 85 percent credit (*i.e.*,$170,000) on the $200,000 deposit, and not receive the benefit of the remedial credit.

[25] CTI asks the Commission to clarify that accrued payments be amortized over the remaining license term. *See* CTI Petition at pp. 5-6. Although the Licensees believe that the *Report and Order* clearly stated that this is the case, the Licensees would favor clarification by the Commission to the extent there is deemed to be any ambiguity.

Conclusion

Subject to the necessary clarifications as discussed in this Petition, Licensees endorse the measures adopted by the Commission that create a regulatory structure for the 218-219 MHz Service that will allow licensees to maintain their licenses under reasonable terms and construct their systems or, where necessary, relinquish their spectrum either through private market sales or to the Commission for reauction.

Respectfully submitted,

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